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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JACKIE N. BEACH AND JULIE M. BEACH, HUSBAND
AND WIFE,

vs.

Petitioners

OWENS-CORNING FIBERGLASS CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NEWBY, LEWIS, KAMINSKI &
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court exercising diversity jurisdiction may ignore the Seventh Amendment by deciding disputed issues of fact pursuant to state procedure.

2. Whether the case of Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958) is still the law.

3. Whether Federal Courts should continue to follow the approach announced in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958) when allocating duties between the judge and jury.

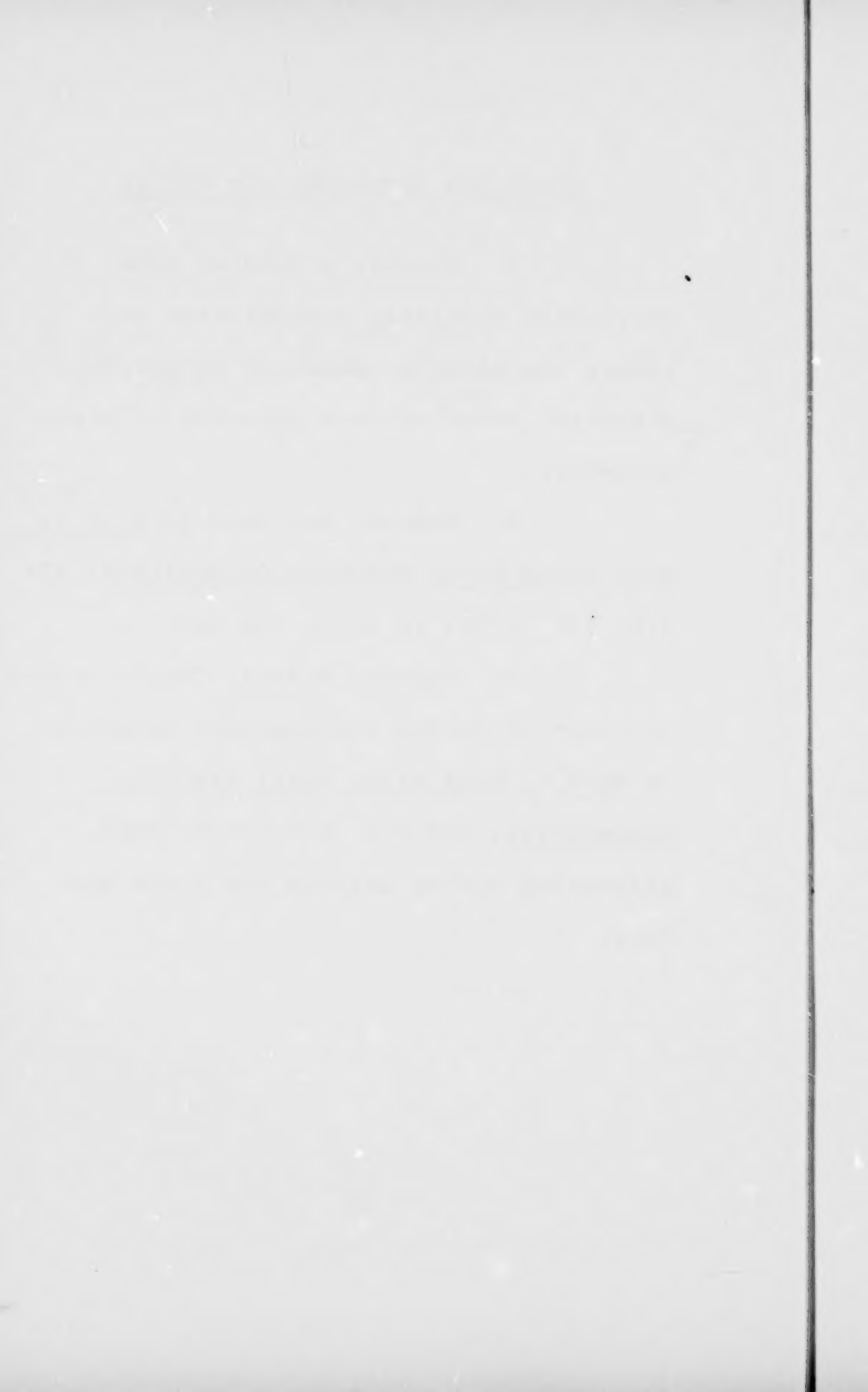


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IN THE
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October Term, 1984

JACKIE N. BEACH and JULIA
M. BEACH, Husband and Wife,
Petitioners

vs.

OWENS-CORNING FIBERGLAS
CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

TO THE CHIEF JUSTICE OF THE
UNITED STATES AND THE ASSOCIATE
JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

Petitioners, Jackie N. Beach and
Julia M. Beach, husband and wife,
respectfully pray that a writ of certiorari
be issued to review the decision in this
case of the United States Court of Appeals
for the Seventh Circuit.



OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana is reported at 542 F. Supp. 1328 (N.D. Ind. 1982). The original opinion of the United States Court of Appeals for the Seventh Circuit is not reported. The revised opinion of the Court of Appeals is reported at 728 F. 2d 407 (7th Cir. 1984). All opinions are reproduced in the Appendix hereto.

JURISDICTION

1. On January 16, 1984, the Court of Appeals for the Seventh Circuit entered its judgment, attached as Appendix B, affirming the District Court in this matter. On February 24, 1984, the Court of Appeals issued a revised opinion, attached as Appendix C, denying plaintiff Beach's timely Petition for Rehearing and Suggestion for Hearing En Banc.

2. The jurisdiction of this Court to review the judgment of the Court of Appeals, and to issue the Writ of Certiorari is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The Seventh Amendment to
the United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Indiana Workmen's
Compensation Act,
Pertinent Section:
Indiana Code 22-3-2-6

22-3-2-6 Rights and remedies of
employee exclusive. The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of

such employee, his personal
representatives, dependents or
next of kin, at common law or
otherwise, on account of such
injury or death.



STATEMENT OF THE CASE

The petitioner, Jackie Beach, is an Indiana citizen. Owens-Corning Fiberglas Corp. is an Ohio corporation. Jackie Beach has asked for in excess of \$10,000.00 in damages from Owens-Corning. Jurisdiction of the United States District Court for the Northern District of Indiana was conferred by 28 U.S.C. §1332(a).

Jackie Beach was injured while working at the defendant's Owens-Corning plant. Beach has been precluded from asserting his cause of action against Owens-Corning because the courts below held that Beach was an employee of Owens-Corning as a matter of law.

The petitioner, Jackie Beach, was an employee of U.S. Piping, Inc. from the summer of 1977 until he was injured on the job on March 7, 1978. (App. D at D-1).



During this period, Beach worked for U.S. Piping at the Owens-Corning R & C Plant in Porter County, Indiana. As an employee of U.S. Piping, Beach provided services which U.S. Piping had contracted to perform for Owens-Corning. The agreement between Owens-Corning and U.S. Piping contained the following:

Contractor [U.S. Piping] shall furnish all labor, supervision, tools, supplies, . . . and all other services, facilities and means of construction required to do piping and other work at Owens-Corning Fiberglas Corporation, R & C Plant . . .

(App. A at A-2).

Beach was injured on March 7, 1978 while he worked on a "deaerator" which was part of a high-pressure steam system at the Owens-Corning R & C Plant. At the time of the accident, Fred Hartman, a supervisor for Owens-Corning, was working with Beach



on the deaerator. (App. D at D-7).

Hartman had asked Beach's supervisor at U.S. Piping for permission to use Beach for the specific purpose of adjusting a valve on the deaerator. (App. D at D-5).

Owens-Corning personnel had often asked U.S. Piping supervisors for permission to use U.S. Piping employees to perform tasks which U.S. Piping had contracted to perform. The work Beach was engaged in at the time of his injury was part of the services which U.S. Piping had contracted to perform for Owens-Corning. (App. D at D-6).

Beach was paid directly by U.S. Piping; Beach supplied his own tools; and Beach never received wages from Owens-Corning. (App. D at D-2, D-3). Owens-Corning did not have the right to discharge Beach, did not supply his tools



and had no formal contract with him. (App. A at A-9). Beach brought this action in the United States District Court asking Owens-Corning for damages sustained by Beach because of the March 7, 1981 injury. Owens-Corning moved for summary judgment on the ground that it was an employer of Beach at the time of the injury and thus the Industrial Board had sole jurisdiction of Beach's claims against Owens-Corning under the Indiana Workmen's Compensation Act, Ind. Code §22-3-2-6. (App. A at A-3). Indiana Workmen's Compensation Act does not provide an adequate remedy for injuries as serious as those sustained by Beach.

The Honorable Michael S. Kanne, Judge of the United States District Court for the Northern District of Indiana, Hammond Division, on July 9, 1982, granted Owens-Corning's motion for summary



judgment. The Court held it did not have jurisdiction over Beach's claims because the Industrial Board of the State of Indiana had exclusive jurisdiction since Beach was an employee of Owens-Corning. (App. A at A-12). Without a hearing and relying solely on products of discovery, the Federal Judge decided questions of fact and ignored the United States Supreme Court holding in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958).

The District Court felt compelled by an Indiana state court decision, Downham v. Wagner, ____ Ind. App. ____, 408 N.E.2d 606, 611, 612 (1980), to determine as a matter of law whether Beach was an employee of Owens-Corning. (App. A at A-2). As stated below, the Byrd court had announced that for cases tried in federal courts the United States Constitution granted a right



to a jury determination of the question of whether a person is an employee.

On January 16, 1984, the United States Court of Appeals for the Seventh Circuit issued its original unpublished opinion affirming the District Court's judgment that exclusive jurisdiction of Beach's claim rests with the Industrial Board of Indiana. The Seventh Circuit, relying on Downham, held the District Court could decide Beach's employment status as a matter of law. (App. B at B-4). It is clear that the Federal District Judge Kanne weighed various discovery materials and struggled to reach a decision which should have been left to a jury.

The Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing En Banc. However, the Court of Appeals issued a revised opinion on

1871-1872

1873-1874

1875-1876

1877-1878

1879-1880

1881-1882

1883-1884

1885-1886

1887-1888

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1891-1892

1893-1894

February 24, 1984. In the revised opinion, the Court of Appeals changed its holding. The Court held the District Court did have jurisdiction over Beach's claim but the Court affirmed the District Court's "correct" decision, even if it was based on incorrect reasoning. (App. C at C-2 n. 1). In its revised opinion, the court affirmed the District Court's finding that Beach was an employee of Owens-Corning as a matter of law. This holding is contrary to federal procedure.

Thereafter, your petitioners filed this Petition for Writ of Certiorari.



REASONS FOR GRANTING THE WRIT

This case raises important questions of law focusing on the Seventh Amendment to the United States Constitution and the right to a jury trial which the Supreme Court of the United States should resolve. The two opinions issued by the Seventh Circuit Court of Appeals conflict with decisions of the other Circuits and is a substantial departure from previous decisions of this Court.

This Court can consider, for the first time since 1959, how federal courts sitting in diversity jurisdiction should distribute duties between the judge and jury. In doing so, this Court must also decide whether Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958) is still the law or whether the Seventh Circuit's revised opinion in this case properly states the current law.



I.

THE JUDGMENT OF THE COURT
OF APPEALS CONFLICTS WITH
DECISIONS OF THIS COURT AND
VIOLATES THE SEVENTH AMENDMENT

In Byrd v. Blue Ridge Rural
Electric Cooperative, 356 U.S. 525 (1958),
this Court held that when a District Court
sitting in diversity is hearing a workmen's
compensation claim, the Seventh Amendment
requires that the jury and not the judge
must decide whether a plaintiff is an
employee of a defendant, regardless of a
state procedure to the contrary.

The facts in Byrd are nearly
identical to the present case. In both, a
plaintiff was injured while working for a
construction contractor pursuant to a
contract with the defendant. In both, the
defendant raised the defense in federal



District Court that the plaintiff was its employee and the plaintiff's exclusive remedy was under the Workmen's Compensation laws of his state. In both, the state procedure required the judge to determine as a matter of law whether the plaintiff was an employee.

In Byrd, this Court held under the Erie Doctrine, Erie R. Co. v. Thompkins, 304 U.S. 64 (1938), that federal courts should follow federal procedure and not state procedure when determining the role of the jury.¹ The court said the Seventh Amendment commanded the District Court to follow the federal procedure of

¹Byrd was soon reinforced Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959), where this Court again held that the jury, not the judge, must determine under the facts of the case whether a plaintiff is an employee within the meaning of a Workmen's Compensation Act (Pennsylvania).



assigning decisions of disputed questions of fact to the jury. 356 U.S. at 537.

Neither the District Court nor the Court of Appeals followed Byrd. The District Court failed to follow Byrd because it incorrectly believed under Downham v. Wagner, ____ Ind. App. ____, 408 N.E.2d 606 (1980), that it was deciding whether it had jurisdiction. The Court of Appeals in its original opinion also incorrectly believed the issue was jurisdictional. (App. B at B-1, B-2).

In its revised opinion, the Court of Appeals changed its holding and conceded the employment issue was not jurisdictional since the District Court had diversity jurisdiction over Beach's claim. (App. C at C-10, C-11). When the Court of Appeals realized the District Court incorrectly decided the case on a jurisdictional issue,



it should have remanded the case to the District Court and ordered proceedings consistent with Byrd. Instead, the court ignored Byrd and affirmed the District Court's decision.

The Court of Appeals held:

An employee or his representatives or kin may make no claim other than before the Indiana Disputes Board.

(App. C at C-10).

The Court of Appeals simply ignored the fundamental issue of the appeal: whether the judge or the jury should decide Beach's employment status. The Court of Appeals held "Owens-Corning was Beach's employer at the time of the accident as a matter of law". (App. C at C-7). The Court of Appeals, however, based its decision on findings of fact by the District Court that Owens-Corning:



'clearly possessed and was exercising th[e] right to control the means, manner and method of the plaintiff's work, at the time of the accident.' Beach, 542 F. Supp. at 1330.

Court of Appeals citing the District Court. (App. C at C-6).

It is crucial to the issue of this case that the District Court when it made its findings thought it was compelled by Indiana law [Downham] to find facts and resolve factual disputes. The Seventh Amendment and Byrd require a jury and not the Court to resolve disputed facts relating to employment status, regardless of a state procedure to the contrary. 356 U.S. at 538. The Court of Appeals, by relying on the factual findings of the District Court and declaring that Byrd did not apply to this case, chose to ignore Byrd.



This Court should issue a writ of certiorari to reaffirm its holding in Byrd that federal juries and not federal judges should resolve disputed facts relating to employment status in certain workmen's compensation cases. This Court should hear the case to preserve Seventh Amendment Rights in federal courts.

II.

REVIEW BY THIS COURT WILL UPHOLD
THE CONSTITUTIONAL POLICIES WHICH
WERE IGNORED BY THE SEVENTH CIRCUIT

The Court of Appeals, by relying on findings of fact made by the District Court, flatly ignored Byrd and implicitly held that Byrd is no longer good law. The policies underlying Byrd are still valid and the Court of Appeals erred in ignoring Byrd and the underlying policies.



The Byrd decision was based on the Seventh Amendment to the Constitution of the United States. Since the Seventh Amendment does not apply to the states, state courts may, under their state procedure, distribute the duty of deciding employment status to the judge. This Court in Byrd, however, recognized the federal system is an independent judicial system which

distributes trial functions between judge and jury and, under the influence - if not the command - of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

356 U.S. at 537.

Under the command of the Seventh Amendment, this Court held federal courts must follow federal procedure and permit the jury to resolve the employment issue in cases such as the one at bar.



Byrd also carefully considered the policy of uniform enforcement of state created rights. This Court realized states have an interest in not having litigation decided one way in a federal court and another way in a state court. 356 U.S. 537-538.

This Court then balanced the federal policy favoring jury resolutions of disputed facts against the policy of uniform enforcement. This Court ruled that when determining whether a plaintiff is an employee of a defendant, the policy favoring jury resolutions of facts outweighs the policy of uniform enforcement.² Consequently, the jury and not the judge determines employment status. Id.

²The Byrd decision is also based on the principle that a state cannot disrupt the relationship between the judge and jury in federal courts. 356 U.S. at 538.



The Court of Appeals by not following Byrd holds these policies are no longer valid. This court should issue a writ of certiorari to reaffirm these policy considerations.

III.

REVIEW BY THIS COURT WILL
INSURE THAT FEDERAL COURTS
WILL CONTINUE TO FOLLOW THE
BYRD APPROACH WHEN ALLOCATING
DUTIES BETWEEN THE JUDGE AND JURY

In Byrd, this Court examined the state's interest in submitting the employment status issue to a judge and not a jury. This Court found that the state's interest in having a judge decide employment status under the state's workmen's compensation law was not "bound up" with the state substantive law. Since the state's interest was not "bound up"



with the state law, the strong federal policy favoring trial by jury prevailed and the District Court had to follow the federal procedure. 356 U.S. at 537-538.

The process of examining both the state and federal interests before eventually deciding whether federal or state law should apply has been interpreted by the circuits as the Byrd "balancing test". See, e.g. Wilson v. Nooter Corp., 475 F. 2d 497, 503-504 (1st Cir. 1973), cert. denied, 414 U.S. 865 (1973); Wheeler v. Shoemaker, 78 F.R.D. 218, 225 (D.R.I. 1978); ("[t]he Byrd balancing approach" applies to decisions which affect "the role of the jury in the federal system".); Karlson v. 305 East 43rd St. Corp., 370 F. 2d 467, 472 n. 1 (2d Cir. 1967); cert. denied, 387 U.S. 905 (1967) ("A remittitur concerns the relationship between the



Federal judge and jury, it is a question of federal law. Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,").

Federal courts have found the Byrd approach important when allocating the duties between the judge and jury. The Seventh Circuit's decision in this case casts doubt on the important Byrd approach because the Seventh Circuit simply accepted the state law procedure without analysis.

This Court should grant certiorari to reaffirm the Byrd approach that federal courts should allocate duties between the judge and jury according to federal procedure unless there is a state procedure to the contrary which is "bound up" with the state substantive law. Failure to grant certiorari in a case strikingly similar to Byrd would sent out a message that the Byrd approach is no longer

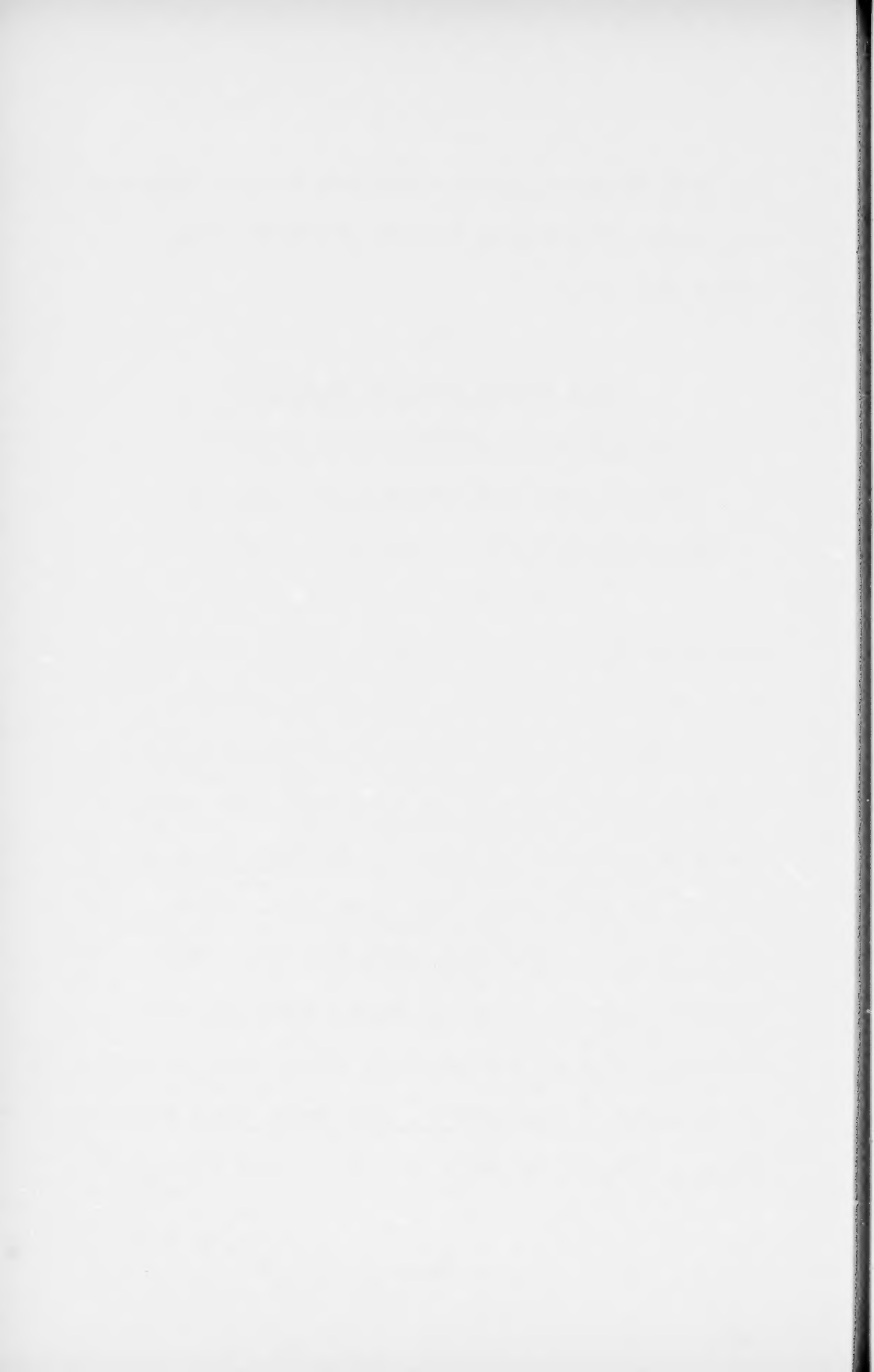


law and federal courts should follow state law when allocating duties between the judge and jury.

IV.

THIS COURT SHOULD RESOLVE
THE CONFLICT BETWEEN THE SEVENTH
CIRCUIT AND THE OTHER CIRCUITS OVER
THE APPLICATION OF THE BYRD APPROACH

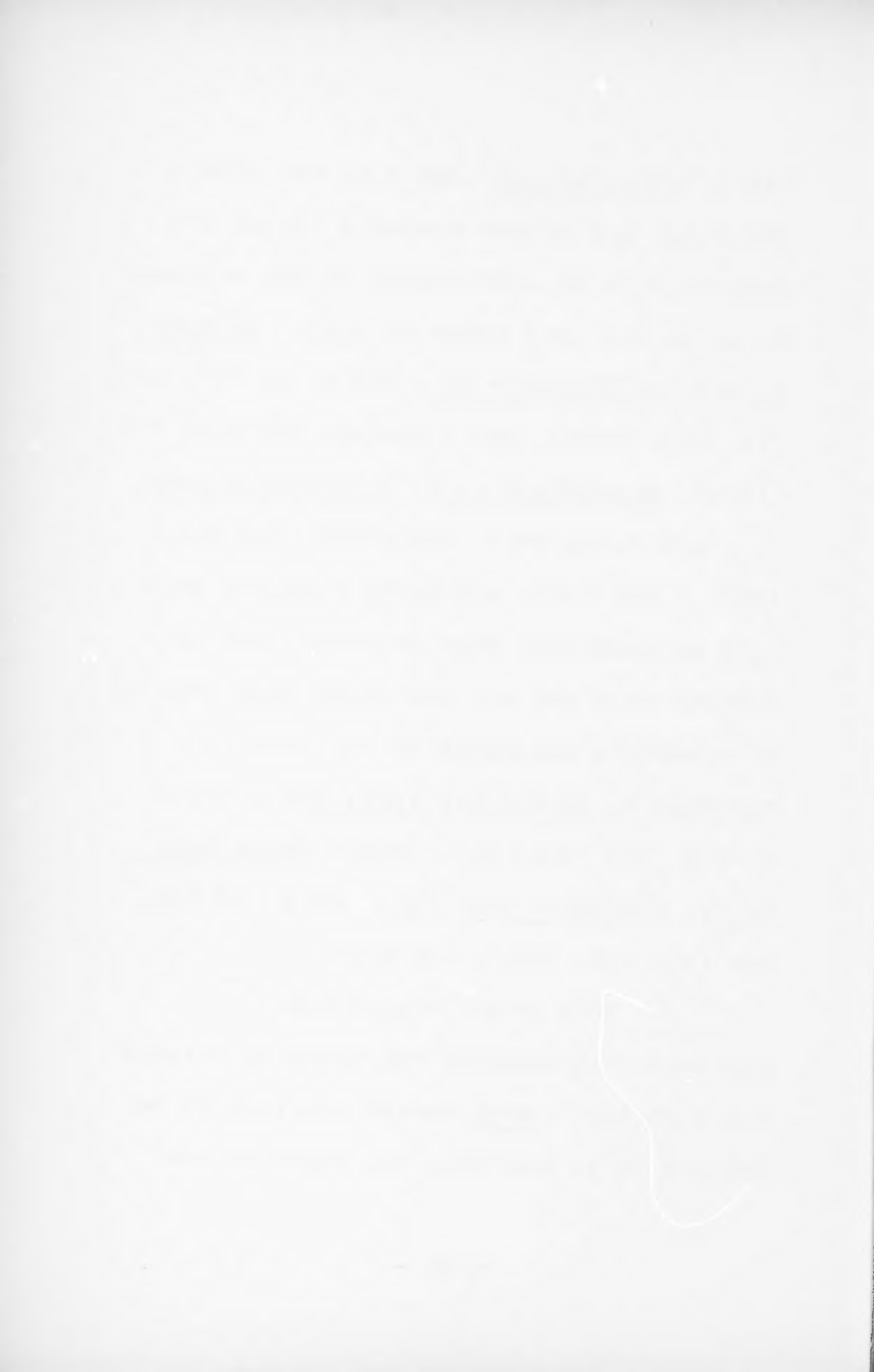
The Seventh Circuit, by not applying Byrd to this case, is in conflict with other circuits. The First Circuit, citing Byrd for authority, followed the federal jury size of six rather than the state's twelve. Wilson v. Nooter Corp., 475 F. 2d 497, 503, 504 (1st Cir. 1973), cert. denied, 414 U.S. 865 (1973). The Second Circuit, citing Byrd, applied the federal rule of remittitur of a jury award of damages. Karlson v. 305 East 43rd St. Corp., 370 F. 2d 467, 472 n. 1 (2d Cir.



1967), cert. denied, 387 U.S. 905 (1967).

The First and Fourth Circuits follow the federal rule of sufficiency of the evidence to go to the jury based on Byrd. Molinar v. Western Electric Co., 525 F. 2d 521, 527 (1st Cir. 1975), cert. denied, 424 U.S. 978 (1976); Wratchford v. S. J. Groves & Sons Co., 405 F. 2d 1061, 1065-1066 (4th Cir. 1969). The Fifth and Tenth Circuits used Byrd as authority when deciding that the federal rule and not the state rule applies to counsel's arguments to the jury. McDonald v. United Airlines, Inc., 365 F. 2d 593, 595 (10th Cir. 1966); Baron Tube Co. v. Transport Ins. Co., 365 F. 2d 858, 862 (5th Cir. 1966) (en banc).

This court should grant certiorari to resolve the conflict between the circuits. Byrd should continue to be applied as it has been for years by the



other circuits and the Seventh Circuit should be ordered to follow the Byrd decision.

CONCLUSION

The petitioner, Jackie Beach, has been seriously injured and is attempting to assert a cause of action against Owens-Corning, a company which never contracted with him and never paid him wages. Jackie Beach never considered himself an employee of Owens-Corning.

The District Court followed state procedure and held as a matter of law that Jackie Beach was an employee of Owens-Corning and as an employee his exclusive remedy was under Indiana Workmen's Compensation Act.

The District Court, under Byrd and Erie, should have followed federal procedure and required the jury to



determine whether Beach was an employee of Owens-Corning. The Court of Appeals should have ordered the District Court to require the jury to decide whether Beach was an employee. By deciding Beach was an employee as a matter of law, the Seventh Circuit ignored Supreme Court precedent, violated the Seventh Amendment, and was in conflict with decisions of other circuits.

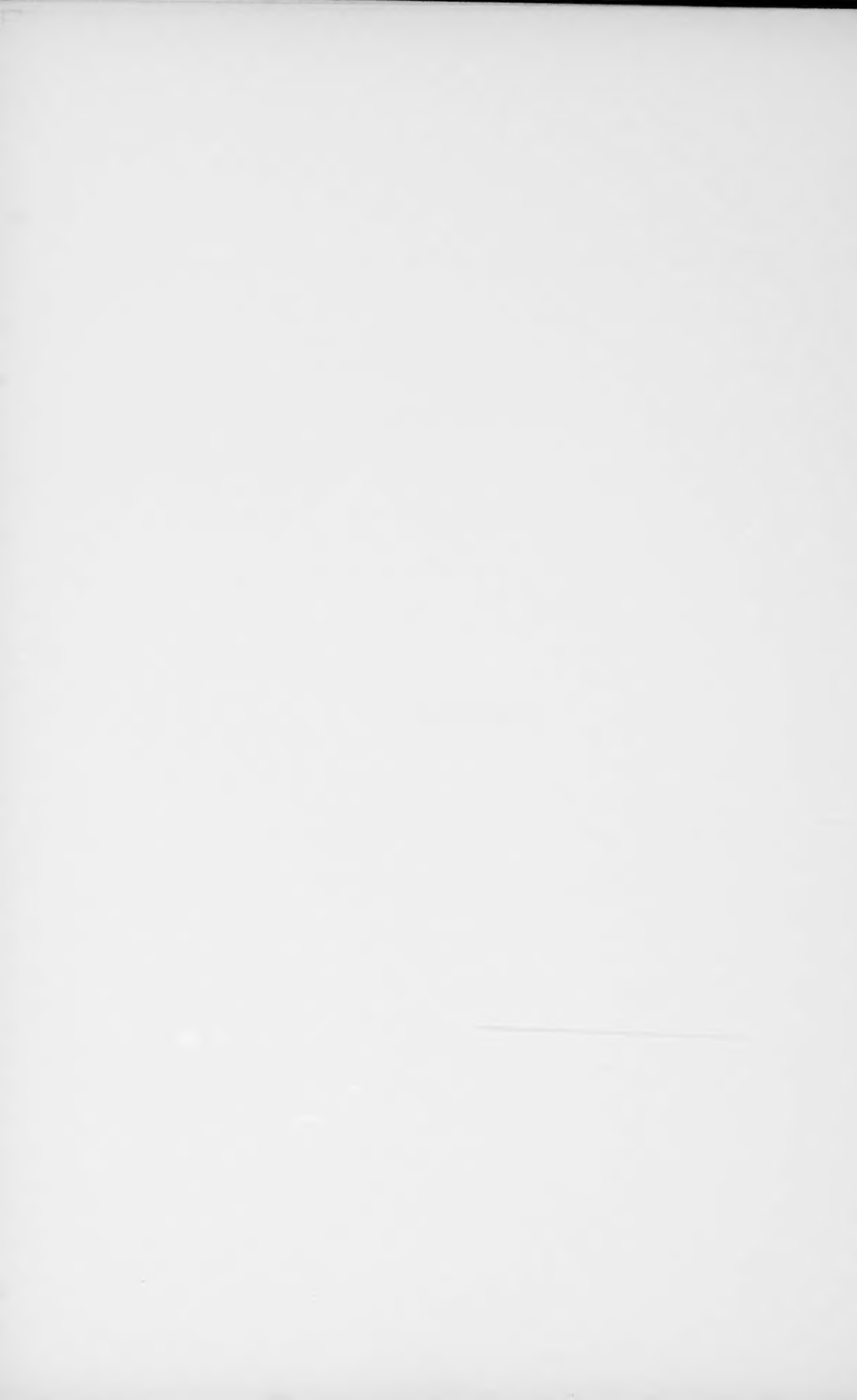
The doctrine of stare decisis and the United States Constitution require that Jackie Beach be given his right to a jury determination of his employment status. The decision of the United States Court of Appeals for the Seventh Circuit should be reviewed upon a writ of certiorari and should be reversed.

Respectfully submitted,

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APPENDIX



JACKIE N. BEACH and JULIA M. BEACH,
Husband and Wife, Plaintiffs,

v.

OWENS-CORNING FIBERGLAS CORPORATION,
Aqua-Chem, Inc., Cleaver-Brooks
Division of Aqua-Chem, Inc.,
Dresser Industries, Inc., Defendants.

No. H 80-70

United States District Court,
N.D. Indiana,
Hammond Division,

July 9, 1982.

MEMORANDUM DECISION AND ORDER

KANNE, District Judge.

This matter is before the Court
on the motion of the defendant,
Owens-Corning Fiberglas Corporation
(Owens-Corning), for summary judgment. For
the reasons stated below, the motion will
be granted.

The events from which plaintiffs' claims arose took place at the Owens-Corning R & C Plant in Porter County, Indiana, on March 7, 1978. The plaintiff, Jackie Beach, was an employee of U.S. Piping, Inc. U.S. Piping, Inc., had contracted with Owens-Corning to furnish:

all labor, supervision, tools, supplies, . . . and all other services, facilities and means of construction required to do piping and other work at Owens-Corning Fiberglas Corporation, R & C Plant . . .

Plaintiffs' Exhibit B, par. 1(a).

Paragraph 3 of the contract provided as follows:

Subject to the terms of the contract, work shall be solely under the direction of Mr. Richard Miller, the OCF Project Manager, or his authorized representative.

While acting under the direct supervision of Fred Hartman, an employee of

Owens-Corning, Jackie Beach was turning a valve on a newly installed deaerator unit when steam escaped thereby injuring Beach.

Owens-Corning claims that it was an employer of Jackie Beach at the time of the accident, relying on Indiana's borrowed servant doctrine. If Owens-Corning's position is correct, sole jurisdiction over plaintiffs' claim against Owens-Corning would lie with the Industrial Disputes Board under the Indiana Workmen's Compensation Act, Ind. Code §22-3-2-6.

[1] Plaintiffs contend that summary judgment is not proper in this case. First, they argue that there is a disputed issue of material fact as to whether Jackie Beach was an employee of Owens-Corning. However, Downham v. Wagner, Ind. App., 408 N.E.2d 606 (1980), makes clear that the court must determine as a

matter of law whether plaintiff is an employee or independent contractor in order to determine if the Workmen's Compensation Statute deprives the court of jurisdiction.

[2, 3] Second, plaintiff maintains that defendant "flunks" the tests enunciated in Fox v. Contract Beverage Packers, Inc., Ind. App., 398 N.E.2d 709 (1980) for determining the existence of an employer-employee relationship. Owens-Corning counters that utilizing the "decisive" test of control over the means, manner, and method of performance of his work, Jackie Beach was a borrowed servant of Owens-Corning at the time of the accident.

It appears that two Indiana appellate decisions have utilized the "decisive" test in a Workmen's Compensation

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context. In Jackson Trucking Company v. Interstate Motor Freight System, 122 Ind. App. 546, 104 N.E.2d 575 (1953), a case involving two carriers operating under a lease agreement, it was found that each carrier was liable as an employer of a driver who was accidentally killed in the course of his employment.

This court stated that the real and decisive test of employment under such circumstances is who had the power or right to command the act and to direct and control the means, manner or method of performance, and to whom was the driver accountable upon arrival at his destination. The opinion determined that both carriers were employers who had associated themselves together and were in direct control of the employee so that he was considered the employee of both carriers.

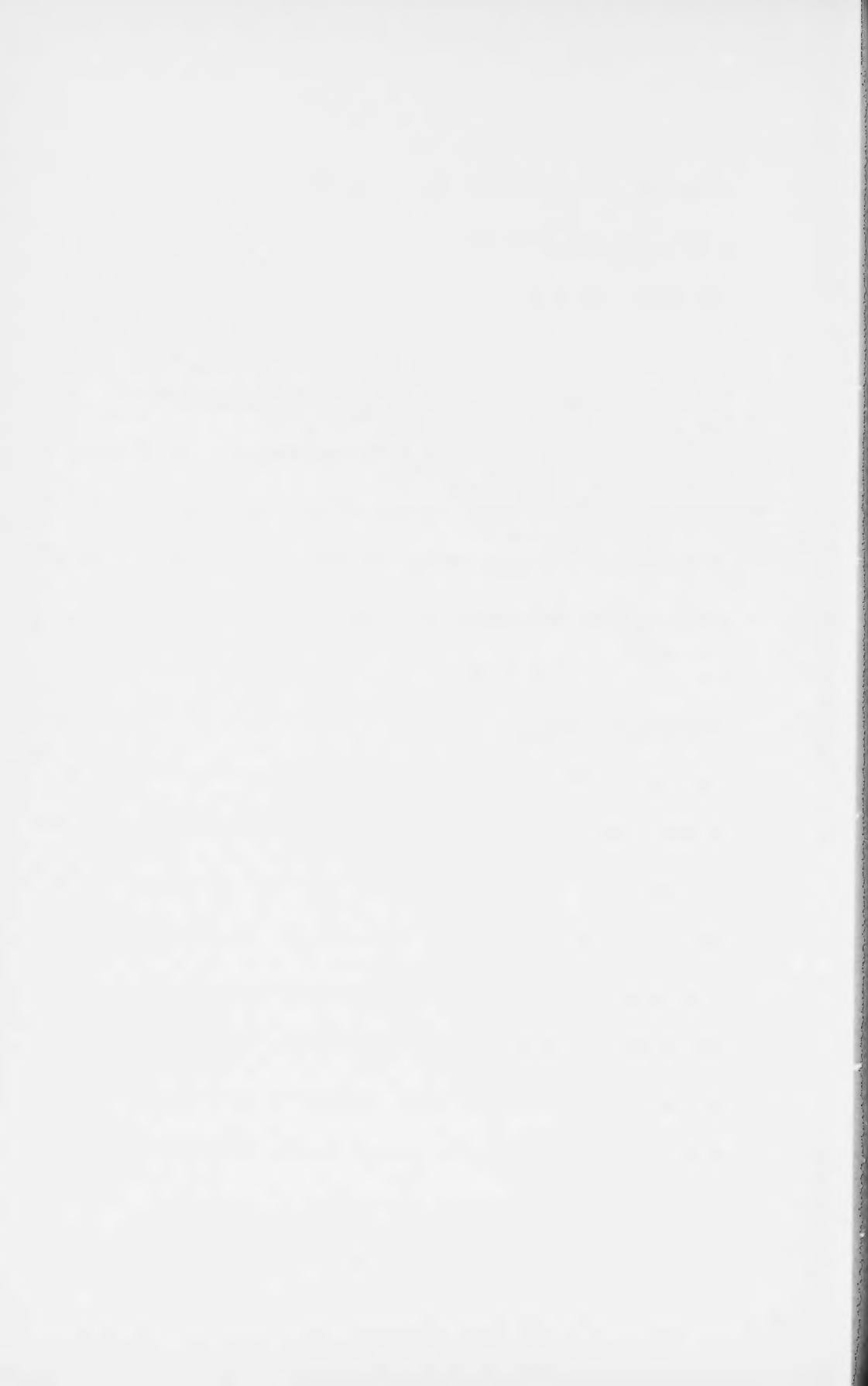
Wabash Smelting, Inc. v. Murphy, 134 Ind. App. 198, 186 N.E.2d 586, 592 (1963).

In Wabash Smelting, the court found that a firm which had leased a truck,



placed the driver on its payroll and instructed him as to what to do, had "mixed" control over the truck, the driver, and the manner, means and method of his performance with the lessee, who had employed and chosen the driver. It found that because they were dual employers of plaintiff, both were jointly liable to him under the Workmen's Compensation Act.

In Fox v. Contract Beverage Packers, Inc., supra, the Court of Appeals recognized that "an individual can be the employee of two employers if both employers possess a substantial, but not necessarily exclusive, right or power of control over the employee and the means, manner, and method of his performance." It utilized seven factors in determining whether an employee of a temporary help agency was



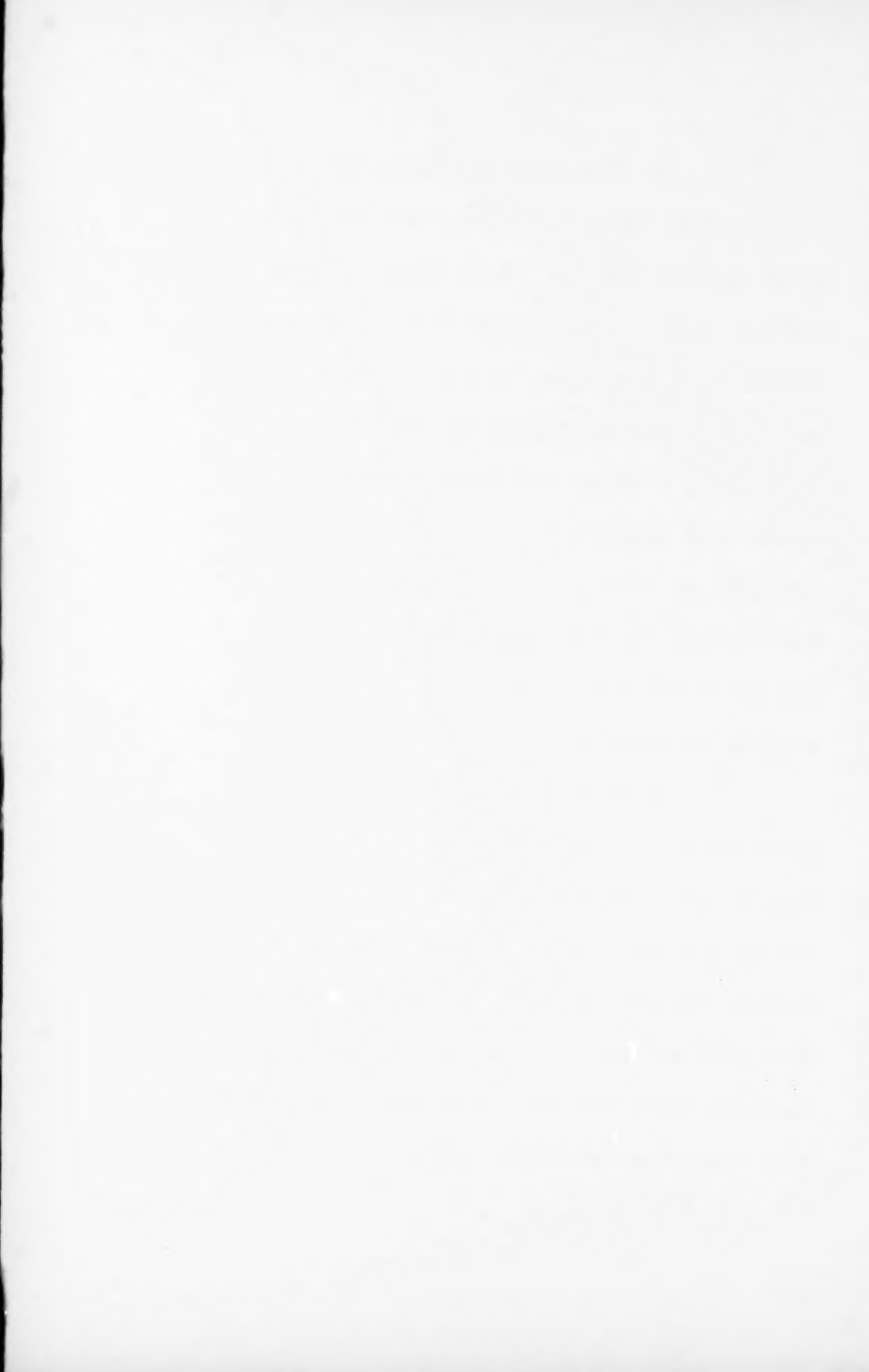
also an employee of the firm where he was filling in:

(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries.

In that case plaintiff had been assigned to the plant by Manpower; but Contract Beverage had the option of dismissing him; had control of him while working at the plant; determined his hours; and, supplied his equipment and tools. 398 N.E.2d at 711-712. Because a majority of the indicia of an employer-employee relationship were present, the court found that Contract Beverage was Fox's employer and thereby subject to the Workmen's Compensation Act.

In the case at bar, both U.S. Piping and Owens-Corning exercised control over Jackie Beach. U.S. Piping, the general employer, hired him, paid his wages, and assigned him to work at the project. Beach supplied his own tools. Both U.S. Piping and Owens-Corning exercised supervision over him while he was working at the plant. According to Beach's testimony, he had been working at the plant for part of the summer and during the entire winter of 1977-78.

His U.S. Piping supervisor generally turned him over to the Owens-Corning supervisor, Hartman, who would assign him to a job. Deposition of Jackie Beach, p. 14. He would ask Hartman for advice and instructions. Id., p. 15. Hartman had control over what he did during his overtime period. Id., p. 22.



At the time of the accident on March 7, 1978, Jackie Beach was being directed both as to what he did and how he performed the work by Hartman, the Owens-Corning supervisor. Id., pp. 18, 63, 110; Deposition of Carl Babcock, pp. 47, 62.

Thus, while Owens-Corning (1) did not have the right to discharge Jackie Beach; (2) did not pay him his wages directly; (3) did not supply his tools; and (4) had no formal contract of employment with plaintiff; it (1) did control the place and the manner in which plaintiff was performing his work' (2) did exercise direct supervision over him at the time of the accident; (3) did contract with U.S. Piping for his services, and paid U.S. Piping for his services on a time and material basis; and (4) had the right to

and did control the boundaries of his work.

Jackie Beach avers he never believed he was an employee of Owens-Corning. However, his own testimony shows that he acquiesced in the direct supervision by Owens-Corning of his work at the plant over a period of several months.

One may be in the general service of another, and, nevertheless, with respect to particular work may be transferred, with his own consent and acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.

Denton v. Yazoo & M. Valley R. Co., 284 U.S. 305, 52 S. Ct. 141, 76 L.Ed.2d 310 (1931), quoted in Standard Oil Co. v. Soderling, 112 Ind. App. 437, 42 N.E.2d 373, 377 (1942).

Both the terms of the contract between U.S. Piping and Owens-Corning, and the lengthy period during which Jackie Beach acquiesced in the direct control of the Owens-Corning supervisor over his work at the Owens-Corning plant, demonstrates that there was an implied contract of service between Jackie Beach and Owens-Corning which existed at the time he was injured.

Under Indiana law, the "real and decisive" test for the existence of a master-servant relationship is "the right to command the act and to direct and control the means, manner or method of performance." Wabash Smelting, Inc. v. Murphy, supra. In this case, Owens-Corning clearly possessed and was exercising that right to control the means, manner and

method of the plaintiff's work, at the time of the accident.

As a matter of law, Owens-Corning was a special employer of Jackie Beach on March 7, 1978, the date of the injury. Therefore, plaintiffs' claims against Owens-Corning properly come under the provisions of Indiana's Workmen's Compensation Act and this court is without jurisdiction over those claims.

Accordingly, upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW it is ORDERED that summary judgment is hereby entered in favor of the defendant, Owens-Corning Fiberglas Corporation, and against the plaintiffs, Jackie Beach and Julia M. Beach.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 82-2373

JACKIE N. BEACH and JULIA M. BEACH,
Wife,
Plaintiffs-Appellants,

v.

OWENS-CORNING FIBERGLAS CORP.,
Defendant-Appellee.

Appeal from the United States
District Court for the Northern
District of Indiana, Hammond Division.
No. H 80-70 - Michael Kanne, Judge.

ARGUED DECEMBER 5, 1983
DECIDED JANUARY 16, 1984

Before BAUER, FLAUM, Circuit
Judges, and EVANS, District Judge.*

*The Honorable Terence T. Evans,
Judge of the United States District Court
for the Eastern District of Wisconsin, is
sitting by designation.

BAUER, Circuit Judge. Plaintiffs Jackie Beach and his wife Julia appeal from entry of summary judgment in favor of Defendant Owens-Corning Fiberglas Corporation. We affirm the district court's judgment that exclusive jurisdiction over this case rests with the Industrial Disputes Board under the Indiana Workmen's Compensation Act, Ind. Code §22-3-1-2 (Burns 1974).

Plaintiff Jackie Beach was employed by U.S. Piping, Inc., which had contracted with Owens-Corning to supply labor on a construction project.¹ Beach was injured while working and sued Owens-Corning. The district court ruled that Beach was an Owens-Corning employee

¹The facts relating to Beach's employment status and accident are presented in the district court's opinion, Beach v. Owens-Corning Fiberglas Corp., 542 F. Supp. 1328 (N.D. Ind. 1982), and need not be restated here.



under Indiana's borrowed servant doctrine at the time he was injured, and thus concluded that the Industrial Disputes Board has exclusive jurisdiction over Beach's claims.

The plaintiffs argue that the district court improperly denied their right to a jury trial by resolving the employment status issue on summary judgment. Moreover, the plaintiffs argue that genuine issues of material fact preclude summary judgment.

I

The plaintiff's argument that they were denied their right to a jury trial misconstrues the nature of the summary judgment proceeding. The district court's decision on the issue of Beach's employment status related only to the threshold jurisdictional issue of whether



the case was exclusively within the province of the state Industrial Disputes Board. State law controls that issue.

The Indiana Workmen's Compensation Act provides the exclusive remedy for injured employees against their employers. Ind. Code §22-3-2-6 (Burns 1974); Kottiss v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), cert. denied, 430 U.S. 916 (1977). The Act vests jurisdiction over such actions in the disputes board. If Beach was an Owens-Corning employee, then the board would have sole jurisdiction over the plaintiff's claims against Owens-Corning.

The issue whether a person engaged for services is an employee of a defendant is jurisdictional. Downham v. Wagner, 408 N.E.2d 606 (Ind. App. 1980).



Since the determination of subject matter jurisdiction is a matter for the court and not the jury, the district court properly could resolve the issue of Beach's employment status on summary judgment. The district court's ruling thus did not raise the issues concerning the right to trial by jury considered in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958), or Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959).

II

The plaintiffs also argue that genuine issues of material fact preclude summary judgment on the employment status issue. We agree with the district court, however, that the material facts were not in dispute. See Beach v. Owens-Corning Fiberglas Corp., 542 F. Supp. 1328, 1329 (N.D. Ind. 1982). The real issue is



whether the district court properly applied the relevant law. We believe that it did.

The Indiana courts have applied a seven-factor test for an employer-employee relationship. Fox v. Contract Beverage Packers, Inc., 398 N.E.2d 709 (Ind. App. 1980). Those factors, discussed by the district court, include who establishes the work boundaries and who controls the means used to do the work. Id. at 712. Indiana courts also have applied a "control" test, stating that "the real and decisive test of employment . . . is who had the power or right to command the act and to direct the means, manner or method of performance" Wabash Smelting, Inc. v. Murphy, 134 Ind. App. 198, 186 N.E.2d 586 (1962). In addition to these tests of employment status, the Fox court recognized that a worker may be an employee of more



than one employer at any given time. Fox, 398 N.E.2d at 711.

The plaintiffs contend that because the defendant does not qualify as an employer under all seven Fox factors, Beach was not an Owens-Corning employee at the time of the accident. The district court rejected this approach in favor of an analysis incorporating both the Fox factors and the control test. Beach, 542 F. Supp. at 1329 (quoting Jackson Trucking Co. v. Interstate Motor Freight System, 122 Ind. App. 546, 104 N.E.2d 575 (1953)). The court concluded that U.S. Piping and Owens-Corning may have been dual employers of Beach and that Owens-Corning "clearly possessed and was exercising th[e] right to control the means, manner and method of the plaintiff's work, at the time of the accident." Beach, 542 F. Supp. at 1330.



We believe that, nothing in Fox mandates a defendant to meet all seven factors before it can be considered an employer, as suggested by the plaintiffs. The district court thus properly applied Fox and the Jackson Trucking-Wabash Smelting control test. Because the defendant clearly had the right to control Beach's work, Owens-Corning was Beach's employer at the time of the accident as a matter of law. Accordingly, the district court did not have jurisdiction over Beach's claims.

AFFIRMED

A true Copy:
Teste:

Clerk of the United
States Court of Appeals
for the Seventh Circuit



IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 82-2373

JACKIE N. BEACH and JULIA M. BEACH,
Wife,
Plaintiffs-Appellants,

v.

OWENS-CORNING FIBERGLAS CORP.,
Defendant-Appellee.

Appeal from the United States
District Court for the Northern
District of Indiana, Hammond Division.
No. H 80-70 - Michael Kanne, Judge.

ARGUED DECEMBER 5, 1983
DECIDED JANUARY 16, 1984
REVISED FEBRUARY 24, 1984*

*The original opinion in this case was issued on January 16, 1984. This revised opinion is issued in light of matters raised in the plaintiffs' petition for rehearing and suggestion for rehearing en banc.

On consideration of the plaintiff's petition for rehearing and suggestion for rehearing en banc, no judge in active service having requested a vote thereon, and all of the judges on the original panel having voted to deny rehearing, it is ordered that the aforesaid petition be, and the same is hereby, denied.



Edward L. Volk, La Porte, Ind.,
for plaintiffs-appellants.

Robin D. Pierce, Merrillville,
Ind., for defendant-appellee.

Before BAUER and FLAUM, Circuit
Judges, and EVANS, District Judge.**

[1] Plaintiff Jackie Beach and
his wife Julia appeal from entry of summary
judgment in favor of Defendant
Owens-Corning Fiberglas Corporation. We
affirm the district court's judgment, but
for reasons different from those on which
the district court relied.¹ The district

**The Honorable Terence T. Evans,
Judge of the United States District Court
for the Eastern District of Wisconsin, is
sitting by designation.

¹We will affirm a district
court's correct decision, even if it was
based on incorrect reasoning. See, e.g.,
Benner v. Negley, 725 F.2d 446, 450 (7th
Cir. 1984); Streit v. Fireside
Chrysler-Plymouth, Inc., 697 F.2d 193 (7th
Cir. 1983).



court ruled that it was without jurisdiction to hear the case, because exclusive jurisdiction rests with the Industrial Disputes Board under the Indiana Workmen's Compensation Act, Ind. Code §22-3-1-2 (Burns 1974). We agree that this case as a matter of law belongs before the disputes board. The proper analysis, however, is that the plaintiffs failed to state a claim upon which relief could be granted.

Plaintiff Jackie Beach was employed by U.S. Piping, Inc., which had contracted with Owens-Corning to supply labor on a construction project.² Beach was injured while working and sued

²The facts relating to Beach's employment status and accident are presented in the district court's opinion, Beach v. Owens-Corning Fiberglas Corp., 542 F. Supp. 1328 (N.D. Ind. 1982), and need not be restated here.

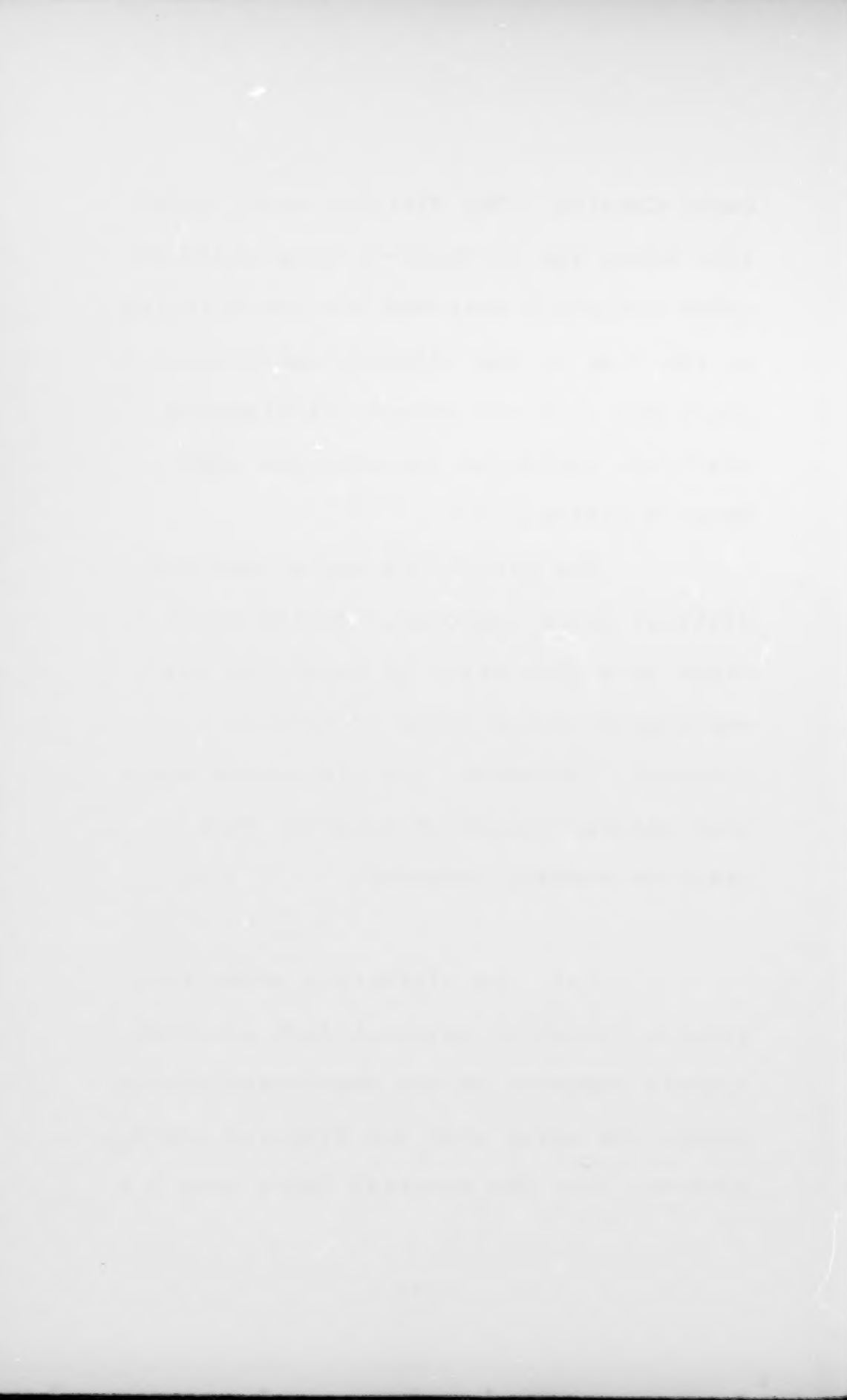


Owens-Corning. The district court ruled that Beach was an Owens-Corning employee under Indiana's borrowed servant doctrine at the time he was injured, and thus concluded that the Industrial Disputes Board has exclusive jurisdiction over Beach's claims.

The plaintiffs argue that the district court improperly denied their right to a jury trial by resolving the employment status issue on summary judgment. Moreover, the plaintiffs argue that genuine issues of material fact preclude summary judgment.

I

[2] The plaintiffs argue that genuine issues of material fact preclude summary judgment on the employment status issue. We agree with the district court, however, that the material facts were not



in dispute. See Beach v. Owens-Corning Fiberglas Corp., 542 F. Supp. 1328, 1329 (N.D. Ind. 1982). The real issue is whether the district court properly applied the relevant law. We believe that it did.

The Indiana courts have applied a seven-factor test for an employer-employee relationship. Fox v. Contract Beverage Packers, Inc., 398 N.E. 2d 709 (Ind. App. 1980). Those factors, discussed by the district court, include who establishes the work boundaries and who controls the means used to do the work. Id. at 712. Indiana courts have applied a "control" test, stating that "the real and decisive test of employment . . . is who had the power or right to command the act and to direct the means, manner or method of performance" Wabash Smelting, Inc. v. Murphy, 134 Ind. App. 198, 186 N.E.2d 586 (1962). In addition to these tests of

employment status, the Fox court recognized that a worker may be an employee of more than one employer at any given time. Fox, 398 N.E.2d at 711.

The plaintiffs contend that because the defendant does not qualify as an employer under the seven Fox factors, Beach was not an Owens-Corning employee at the time of the accident. The district court rejected this approach under an analysis incorporating both the Fox factors and the control test. Beach, 542 F. Supp. at 1329 (quoting Jackson Trucking Co., v. Interstate Motor Freight System, 122 Ind. App. 546, 104 N.E.2d 575 (1953)). The court concluded that U.S. Piping and Owens-Corning may have been dual employers of Beach and that Owens-Corning "clearly possessed and was exercising th[e] right to control the means, manner and method of the

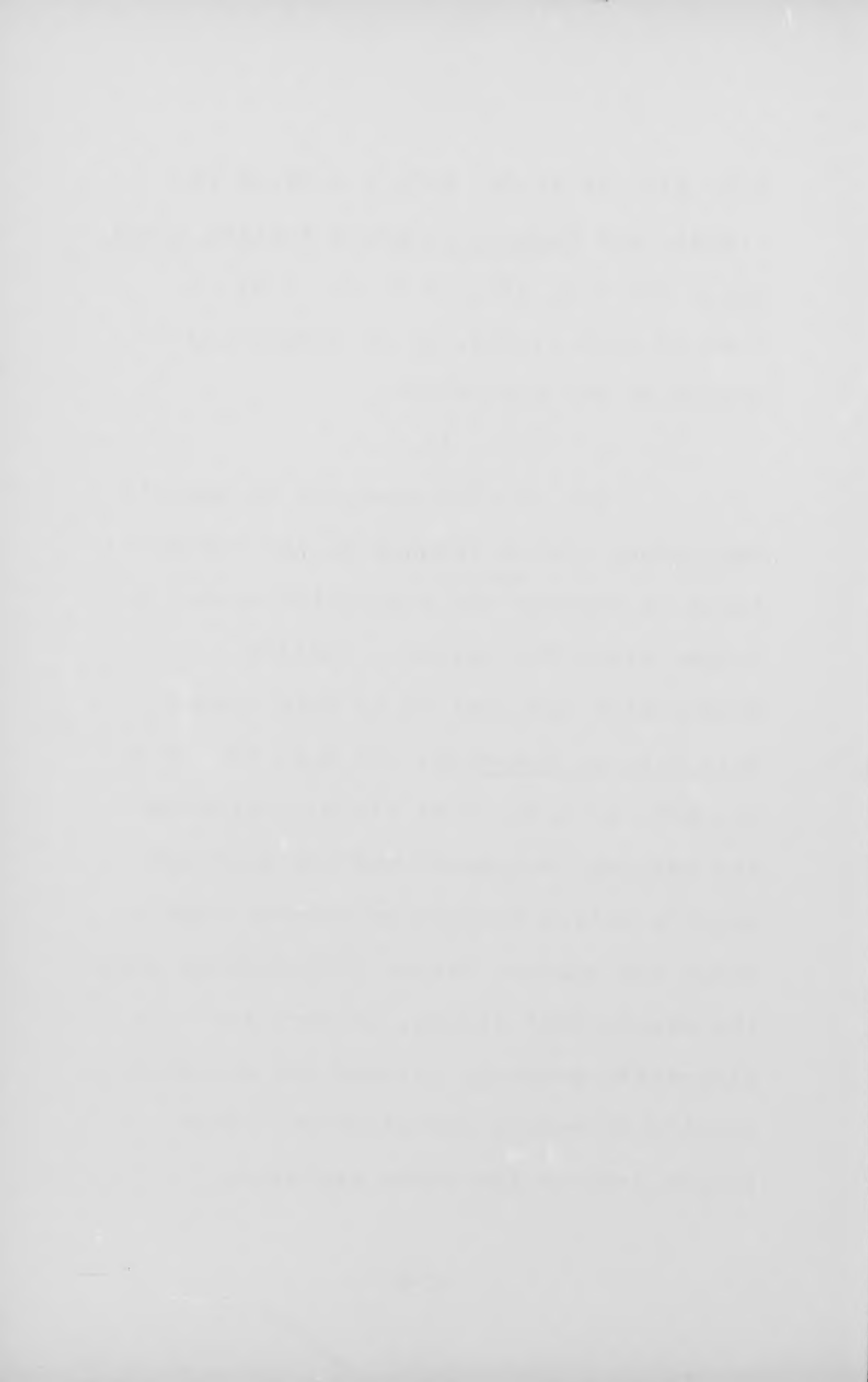
plaintiff's work, at the time of the accident." Beach, 542 F. Supp. at 1330.

We believe that nothing in Fox mandates a defendant to meet all seven factors before it can be considered an employer. The district court thus properly applied Fox and the Jackson Trucking-Wabash Smelting control test. Because the defendant clearly had the right to control Beach's work, Owens-Corning was Beach's employer at the time of the accident as a matter of law. Under no circumstances could Beach be considered not to have been Owens-Corning's employee. Accordingly, the plaintiffs cannot sue in Indiana courts and cannot maintain this action in the federal district court. Our ruling thus does not raise the issues concerning the right to trial by jury considered in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356

U.S. 525, 78 S. Ct. 893, 2 L.Ed.2d 953 (1958), and Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 79 S. Ct. 1184, 3 L.Ed.2d 1224 (1959), as so vehemently argued by the plaintiffs.

II

[3, 4] The question of Beach's employment status relates to the threshold issue of whether the plaintiffs stated a proper claim for relief. Indiana substantive law applies to this issue. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). Although the parties' arguments and the district court's ruling focused on whether that court had subject matter jurisdiction over the plaintiffs' claims, in fact the plaintiffs properly invoked the district court's diversity jurisdiction. Even though Indiana law vests exclusive



jurisdiction over cases such as this one in its Industrial Disputes Board, a federal court properly may exercise jurisdiction over them. State law cannot be construed to enlarge or contract federal jurisdiction. Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1315-16 (9th Cir. 1982).

[5] Despite our ruling that the district court had jurisdiction to entertain this suit, we affirm the entry of summary judgment because Indiana has eliminated the cause of action asserted by the plaintiffs. The Indiana law vesting exclusive jurisdiction over disputes between employees and their employers in the disputes board operates to close state court doors to the plaintiffs. The state's denial of a judicial remedy in this case is a denial of the substantive right asserted

by the plaintiffs.³ An employee or his representatives or kin may make no claim other than before the Industrial Disputes Board. Accordingly, the state courts have no jurisdiction over the plaintiffs' claims, and the plaintiffs therefore have no claim to press in this federal action, which depends entirely upon state law. See

³Indiana Code §22-3-1-2 states, in part: "(a) The industrial board shall have immediate charge of the administration of the provisions of the Workmen's Compensation Act" Section 22-3-2-6 of the Code states:

Rights and remedies of employee exclusive.--The rights and remedies herein granted to an employee subject to this act . . . on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Woods v. Interstate Realty Co., 337 U.S.
535, 538, 69 S. Ct. 1235, 1237, 93 L.Ed.
1524 (1949); Begay, 682 F.2d at 1316-19.

The district court should have ruled that the plaintiffs failed to state a claim upon which relief could be granted. On that basis, the district court's order is affirmed. .

AFFIRMED.



STATE OF INDIANA)
)SS:
COUNTY OF LA PORTE)

AFFIDAVIT

JACKIE N. BEACH, being first duly sworn upon his oath, deposes and says:

1. That he is a journeyman steam pipe fitter working out of Local 597 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO-CLC, and has been such since July 12, 1967.

2. That on and approximately seven to nine months prior to March 7, 1978 he was employed as a steam pipe fitter for U.S. Piping, Inc.

3. That during his employment with U.S. Piping, he was an hourly rate employee of U.S. Piping, Inc. and was paid directly by U.S. Piping, Inc.



4. That on March 7, 1978 during the course of his employment with U.S. Piping, Inc. he was working as a steam pipe fitter at a new construction site at the Owens-Corning Fiberglas Corporation plant in Valparaiso, Indiana.

5. That his direct supervisor on the above mentioned project was Carl Babcock, his foreman, who also worked for U.S. Piping, Inc.

6. That he supplied his own tools of his trade and utilized some tools belonging to U.S. Piping, Inc. and no tools were ever supplied to him by Owens-Corning Fiberglas Corporation.

7. That it is his belief that on March 7, 1978, he was an employee of U.S. Piping, Inc. and never had any belief whatsoever that he was an employee of Owens-Corning Fiberglas Corporation.



8. That he has never been employed by Owens-Corning Fiberglas Corporation, nor has he received any wages from Owens-Corning Fiberglas Corporation, nor has he had any independent contractual relations with Owens-Corning Fiberglas Corporation, and that on March 7, 1978 his wages were paid by U.S. Piping, Inc.

9. The construction site of Owens-Corning Fiberglas Corporation in Valparaiso, Indiana, was a union construction project whereby all work dealing with steam pipe fitting had to be done by union pipe fitters. U.S. Piping, Inc. was the only company hiring union pipe fitters on the project and U.S. Piping, Inc. was under contract with Owens-Corning Fiberglas Corporation to do all pipe fitting under their direction and Owens-Corning employed no pipe fitters

individually for this project to the best of my belief.

10. That the undersigned further states that he has been paid the benefits due him under the Indiana Workmen's Compensation Act by the insurance carrier for U.S. Piping, Inc. and has never received any benefits of any nature or kind since the time of the accident from Owens-Corning Fiberglas Corporation.

/s/ Jackie N. Beach
JACKIE N. BEACH

SUBSCRIBED AND SWORN to before me
this 25th day of February, 1982.

/s/ Sandra L. Daniels
Sandra L. Daniels
Notary Public

My Commission Expires:
September 21, 1982
Resident of La Porte County, Indiana

(Carl Allen Babcock deposition, p. 48)

A. Yeah. Hartman come to me.

Q. Was this for a specific purpose, that he had taken--

A. He come in and asked me if he could have Beach to go in and play around with the spence valve on top of the deaerator and I says, "Go ahead" and that was, I say, late in the afternoon.

(Carl Allen Babcock deposition, pp. 80-81)

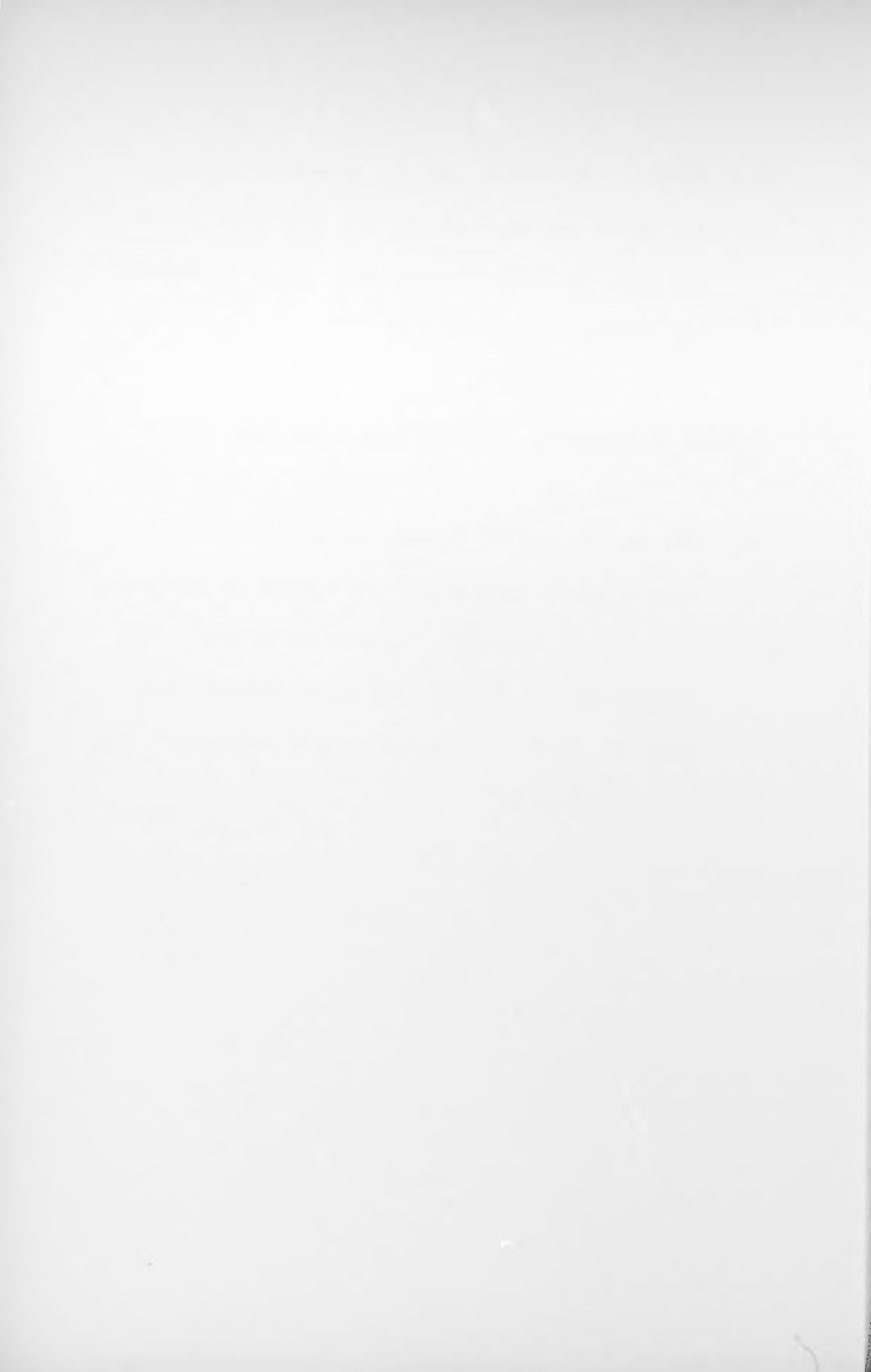
Q. When Hartman came over to you, before the accident occurred and requested the use of a man, which turned out to be Jackie Beach, did he inform you as to what he was intending to do?



A. Yeah. He said, if I remember rightly, he said he wanted to adjust the valve on top of the deaerator, if I remember it correctly.

(John Wisnewski deposition, p. 86)

A. We would go to their superintendent. Their contract also included assistance and start up for the whole plant. We would go to their superintendent and say we required assistance in start up in the boiler room.



A. Yes, it was.

Q. How did Mr. Beach get to the regulator valve?

A. Well, unfortunately he did not use the ladder, he climbed up over a piece of equipment that was sitting beside the deaerator to get up to it and he did not take a ladder.

Q. Did you know where the valve was that needed to be adjusted?

A. Yes.

Q. Did you direct Mr. Beach to that particular valve?

A. He knew where that valve was.

Q. He knew also?

A. Yes.

Q. And he was up there turning the valve while you were watching the gauge?

A. Right.

Q. He could not see the gauge from where he was?

A. No.

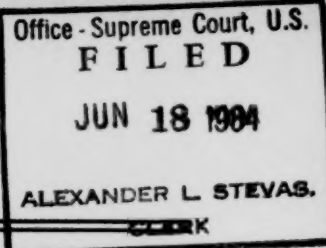
Q. And then after you told him to lock down the valve, what happened?

A. Well, simultaneously the pipe blew apart.

Q. And what did you do?

A. Well, my first indication was, when the room instantly filled with steam and that pipe swung right past me on it's way up into the air, that I did not see how

(2)
No. 83-1906



In The
Supreme Court of the United States
October Term, 1983

— o —
JACKIE N. BEACH and JULIE M. BEACH,
Husband and Wife,
Petitioners,
vs.

OWENS-CORNING FIBERGLAS CORP.,
Respondent.

— o —
**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

— o —
RESPONDENT'S BRIEF IN OPPOSITION

— o —
*ROBIN D. PIERCE
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SPANGLER, JENNINGS, SPANGLER
& DOUGHERTY, P.C.
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(219) 769-2323

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*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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No. 83-1906

In The
Supreme Court of the United States
October Term, 1983

JACKIE N. BEACH and JULIE M. BEACH,
Husband and Wife,
Petitioners,

vs.

OWENS-CORNING FIBERGLAS CORP.,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case was brought in the district court for the Northern District of Indiana. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. §1332(a). The petitioner, Jackie N. Beach, a resident of Indiana, sued

respondent, Owens-Corning Fiberglas Corp.,* an Ohio corporation, for damages for injuries allegedly caused by respondent's negligence. The petitioner was employed by U.S. Piping, Inc., which had contracted with Owens-Corning to supply labor on a construction project being performed on the premises of an Owens-Corning chemical plant. The petitioner was injured by escaping steam as he was turning a valve on a newly installed deaerator unit.

In granting summary judgment in favor of respondent, the district court ruled that at the time of petitioner's injury he was an Owens-Corning employee under Indiana's borrowed servant doctrine, and concluded that the Indiana Industrial Disputes Board had exclusive jurisdiction over petitioner's claim as provided by the Indiana Workmen's Compensation Act, I.C. 22-3-2-6. In reaching its decision on the question of petitioner's employment status, the district court, applying tests recognized under Indiana law, determined that U.S. Piping and Owens-Corning may have

* Respondent has no parent corporation. The only publicly held company owning 10% or more of the stock of respondent is Corning Glass Works, Corning, New York. Respondent is affiliated with: Bayer-Owens Corning Glasswool (Belgium); Fiber Glass Canada, Inc.; Fiber-Glass Columbia, South America; Scandanavian Glass-Fiber, AB (Sweden); Zitro-Fibres, S.A. (Mexico); Zeroc-Technology, A/S (Norway); Polyplaster, S.A. (Brazil); Anianitit Fiberglas Industries, Ltd. (Saudi Arabia); Asahi Fiber-Glass Co., Ltd. (Japan); and Polyarm SA (Rio de Janeiro, Brazil). Respondent has the following subsidiaries: Owens-Corning Fiber Glass Europe S.A. (Belgium); Owens-Corning Fiber Glass Deutschland GMBH (Germany); Owens-Corning Fiber Glass UK, Ltd. (England); Owens-Corning Fiber Glass France, FA; Owens-Corning Fiber Glass Italy, S.r.l.; Owens-Corning Fiber Glass Espana, SA; Owens-Corning Fiber Glass Netherlands, BV; O.C.Fibers, Brazil, LTDE; Owens-Corning Saudi Co., Saudi Arabia; Arabian Fiberglass Insulation Co., Saudi Arabia; Norsk Glass Fiber, A/S (Norway); American Borate Co., Las Vegas, Nevada; and OCFinance, BV (Netherlands).

been dual employers of petitioner and that Owens-Corning clearly possessed and was exercising the right to control the means, manner and method of the petitioner's work, at the time of his injury. Under its analysis of the relevant *indicia* of an employer-employee relationship, the court concluded that the material facts were not in dispute and that respondent was entitled to judgment as a matter of law.

The petitioner appealed from the district court's entry of summary judgment. In his argument before the Court of Appeals, petitioner asserted that there were genuine issues of material fact which precluded summary judgment on the question of his employment status, and further that the district court had improperly denied his right to a jury trial by resolving the employment status issue on summary judgment. The Court of Appeals, in its initial decision filed on January 16, 1984, held that the district court's ruling on the issue of petitioner's employment status related only to the threshold jurisdictional issue of whether the case was exclusively within the province of the Indiana Industrial Disputes Board. Because, as the Court of Appeals noted, the determination of subject matter jurisdiction is a matter for the the court and not the jury, it concluded that the district court could properly resolve the issue of employment status on summary judgment. The Court of Appeals further held that material facts were not in dispute on the question of petitioner's employment status and that the district court had correctly applied Indiana law in reaching its decision.

The petitioner subsequently filed a petition for rehearing and suggestion for rehearing *en banc*. The Court of Appeals thereafter issued a revised opinion on February 24, 1984, and denied the petition for rehearing.

In its revised opinion, the court made it clear at the outset that the district court was correct in concluding that the material facts were not in dispute, and that at the time of his injury petitioner was an employee of Owens-Corning, as a matter of law. The Court revised its earlier decision by indicating that although the parties' arguments and the district court's ruling focused upon whether that court had subject matter jurisdiction, the petitioner, nevertheless, properly invoked the district court's diversity jurisdiction. However, the Court of Appeals affirmed the district court's entry of summary judgment based upon the fact that Indiana had eliminated the cause of action asserted by petitioner.



REASONS FOR DENYING THE WRIT

A. This case presents no constitutional issue regarding the right to a trial by jury.

Petitioner's entire argument on appeal has been based upon the incorrect assumption that the district court resolved disputed issues of fact in reaching its conclusion that he was an Owens-Corning employee at the time of his injury. It is only from this erroneous premise that petitioner is able to draw into consideration this Court's decisions in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), and *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 79 S.Ct. 1184, 3 L.Ed.2d 1224 (1959).

The district court in this case, based upon the Indiana Court of Appeals' decision in *Downham v. Wagner*, 408

N.E.2d 606 (Ind.App. 1980), initially believed that the issue of whether a person engaged for services is an employee of a defendant, was determinative of the federal court's subject matter jurisdiction. *Beach v. Owens-Corning Fiberglas Corp.*, 542 F.Supp. 1328, at page 1329 (N.D. Ind. 1982). Yet, notwithstanding its belief in this regard, which the Court of Appeals later noted was incorrect, the district court did not then proceed to resolve disputed issues of fact. Rather, it applied the undisputed facts in its analysis of Indiana substantive law, and determined as a matter of law that, indeed, the petitioner was an employee, or borrowed servant, of Owens-Corning at the time in question. The Court of Appeals affirmed the district court's decision based upon its conclusion that, in spite of the district court's mis-application of *Downham v. Wagner*, *supra*, the district court was ultimately correct in entering summary judgment where "the material facts were not in dispute." *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407, at page 408 (7th Cir. 1984). It is this singular determination by the Court of Appeals which completely refutes the petitioner's present argument and renders the issuance of a writ inappropriate.

In considering the question of petitioner's employment status, the district court was required to apply Indiana substantive law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938). The Court, accordingly, referred to *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709 (Ind.App. 1980), *Wabash Smelting, Inc. v. Murphy*, 134 Ind.App. 198, 186 N.E.2d 586 (1962), and *Jackson Trucking Co. v. Interstate Motor Freight System*, 122 Ind.App. 546, 104 N.E.2d 575 (1953), in order to ascer-

tain whether, based upon the undisputed facts presented, an employer-employee relationship existed between the parties. In the case of *Fox v. Contract Beverage Packers, Inc.*, *supra*, the court recognized that a worker may be an employee of more than one employer at any given time, and discussed seven factors, or *indicia*, which Indiana courts have applied in resolving the question of employment status. Such factors include:

“(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; (7) establishment of the work boundaries.” *Fox, supra*, 398 N.E.2d 709, at pages 711-712.

In *Wabash Smelting, Inc. v. Murphy, supra*, the court had also articulated a general “control” test, stating that “the real and decisive test of employment . . . is who had the power or right to command the act and to direct the means, manner or method of performance. . . .” 186 N.E.2d 586, at page 592.

The district court’s analysis incorporated both the *Fox* factors and the “control” test from *Wabash Smelting*. Against this background of Indiana law, the district court concluded, and the Court of Appeals agreed, that “[b]ecause the defendant clearly had the right to control Beach’s work, Owens-Corning was Beach’s employer at the time of the accident as a matter of law. Under no circumstances could Beach be considered not to have been an Owens-Corning employee.” *Beach v. Owens-Corning Fiberglas Corp.*, *supra*, 728 F.2d 407, at page 409.

As this Court stated in *Propper v. Clark*, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1342, 93 L.Ed. 480 (1949):

“In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.” See, *Bishop v. Wood*, 426 U.S. 341, 347, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1976).

The petitioner's contention that material questions of fact existed on the issue of his employment status is derived principally from his incorrect analysis of *Fox v. Contract Beverage Packers, Inc.*, *supra*. Thus, the petitioner has sought to maintain that each of the seven *Fox* factors represents a “material fact”, and that because less than all seven factors were found to exist in this case, the petitioner concludes that the district court must have improperly resolved a factual dispute in entering summary judgment. This argument, however, was specifically rejected by the Court of Appeals which stated: “We believe that nothing in *Fox* mandates a defendant to meet all seven factors before it can be considered an employer.” *Beach v. Owens-Corning Fiberglas Corp.*, *supra*, 728 F.2d 407, at page 409. Indeed, the Indiana Court of Appeals in *Fox* had affirmed the entry of summary judgment in a case in which less than all seven factors had been shown.

As indicated previously, it should be noted that the district court's incorrect belief that it was confronted with an issue of jurisdictional consequence did not, because of the undisputed nature of the facts presented, lead it into the province of the jury. As the Court of Appeals stated at page 409 of 728 F.2d:

“[T]he plaintiffs properly invoked the district court’s diversity jurisdiction. Even though Indiana law vests exclusive jurisdiction over cases such as this one in its Industrial Disputes Board, a federal court properly may exercise jurisdiction over them. State law cannot be construed to enlarge or contract federal jurisdiction.”

Although the Court of Appeals found that the district court did have jurisdiction with respect to the petitioners’ claim, it nevertheless affirmed the entry of summary judgment because Indiana had, through its Workmen’s Compensation Act and interpretive case law, eliminated the cause of action asserted by the petitioners. Because the courts of Indiana would have no jurisdiction over the petitioners’ claims, the Court of Appeals reasoned that the petitioners, in effect, had no claim to press in their federal action, which depended entirely upon state law. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949). See: *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315-16 (9th Cir. 1982); *Feinstein v. Massachusetts Gen. Hosp.*, 643 F.2d 880, 888 (1st Cir. 1981). Implicit in the Court of Appeals’ affirmance of the district court, is its conclusion that the district court had reached the correct decision, based upon the undisputed facts, even if the district court’s incorrect assumption with respect to its jurisdiction were removed from consideration. The petitioners’ argument that the district court, relying upon *Downham v. Wagner*, *supra*, undertook to resolve issues of fact is without merit in light of the Court of Appeals’ analysis.

There being no genuine issue as to any material fact, and respondent being entitled to judgment in its favor as a matter of law, the district court was clearly correct in

entering summary judgment in this case. While the posture of the petitioners' present argument would almost make it appear as though they are challenging the summary judgment procedure, in general, as an infringement upon their Seventh Amendment right to trial by jury, this Court made it clear even before the promulgation of the Federal Rules, that "[n]o one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." *Ex parte Peterson*, 253 U.S. 300, 310, 40 S.Ct. 543, 546, 64 L.Ed. 919, 924 (1920).

B. The decision of the Court of Appeals does not conflict with decisions of other circuits, nor does it represent a departure from previous decisions of this Court.

Having incorrectly assumed the existence of a factual dispute, the petitioner is only then able to place reliance upon this court's decisions in *Byrd v. Blue Ridge Rural Electric Cooperative*, *supra*, and *Magenau v. Aetna Freight Lines, Inc.*, *supra*. At issue in *Byrd* was whether a federal district court sitting in diversity was required to apply a South Carolina rule which required the judge, rather than the jury, to decide *factual issues* relating to an employer's immunity under that state's Workmen's Compensation Act. Similarly, in *Magenau*, this Court was concerned with the question of whether a district court in a diversity case was bound to apply a Pennsylvania rule which likewise required the judge to resolve *factual disputes* relative to employment status. In both decisions, this Court found that the state rules in compensation cases, permitting courts to decide factual issues without the aid of juries, were not "announced as an integral part of the special relationship created by the statute." *Byrd*,

supra, 356 U.S. at page 536, 78 S.Ct. at page 900. Accordingly, this Court concluded that “the federal court should not follow the state rule.” *Id.*, 356 U.S. at page 538, 78 S.Ct. at page 901. The circumstances presented in *Byrd* and *Magenau* are thus clearly different from those in the case at bar, in which “the material facts are not in dispute.” *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407, at page 408. The Court of Appeals correctly pointed out that its “ruling does not raise the issues concerning the right of trial by jury considered in [*Byrd* and *Magenau*].” *Id.*, 728 F.2d 407 at page 409. This case does not, therefore, present the proper context for any re-examination of *Byrd* and *Magenau*, and respondent submits that this Court should decline the petitioners’ invitation to do so.

The petitioners’ assertion that the decision of the Seventh Circuit in the present case is in conflict with other circuits which have applied *Byrd* again assumes that *Byrd* is applicable, which it is not. It further appears that if there is any conflict among the circuits which have applied *Byrd* (and no such conflict is shown on the basis of the cases cited by petitioners), it has nothing to do with the point in issue in this case. What is, in fact, made clear by petitioners’ argument is the apparent widespread reliance upon *Byrd* for a variety of principles which possess continued force and validity. That different cases cite different principles, each of which is valid, presents no conflict, and does not render the issuance of a writ of certiorari appropriate.

CONCLUSION

The United States Court of Appeals for the Seventh Circuit has found that the district court in this case was correct in entering summary judgment in favor of respondent, Owens-Corning Fiberglas Corp., based upon undisputed material facts and its interpretation of Indiana substantive law. Accordingly, this case presents no constitutional issue concerning petitioners' right to trial by jury, and the Court of Appeals' decision is not in conflict with previous precedents of this Court, or decisions of the other circuits. The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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